Customs Bulletin and Decisions

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Bureau of Customs and Border Protection

CBP Decisions

RE-ACCREDITATION AND RE-APPROVAL OF OILTEST, INC., AS A COMMERCIAL GAUGER AND LABORATORY

[CBP Dec. 06–36]

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of re-approval of Oiltest, Inc., of Thorofare, New Jersey, as a commercial gauger and laboratory.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 151.12 and 151.13, Oiltest, Inc., 100 Grove Road, Thorofare, New Jersey 08086, has been re-approved to gauge petroleum and petroleum products, organic chemicals and vegetable oils, and to test petroleum and petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 151.13.

DATES: The re-approval of Oiltest, Inc., as a commercial gauger and laboratory became effective on June 13, 2006. The next triennial inspection date will be scheduled for June 2009.

FOR FURTHER INFORMATION CONTACT: Eugene J. Bondoc, Ph.D, or Randall Breaux, Laboratories and Scientific Services, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW, Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: November 29, 2006

IRA S. REESE,
Executive Director,
Laboratories and Scientific Services.

[Published in the Federal Register, December 5, 2006 (71 FR 70524)]

RE-ACCREDITATION AND RE-APPROVAL OF SGS NORTH AMERICA INC.,—BRIDGEPORT, N.J., AS A COMMERCIAL GAUGER AND LABORATORY

[CBP Dec. 06–37]

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of re-approval of SGS North America Inc., of Bridgeport, New Jersey, as a commercial gauger and laboratory.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 151.12 and 151.13, SGS North America Inc., 614 Herron Drive, Bridgeport, New Jersey 08014, has been re-approved to gauge petroleum and petroleum products, organic chemicals and vegetable oils, and to test petroleum and petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 151.13.

DATES: The re-approval of SGS North America Inc., as a commercial gauger and laboratory became effective on June 13, 2006. The next triennial inspection date will be scheduled for June 2009.

FOR FURTHER INFORMATION CONTACT: Eugene J. Bondoc, Ph.D, or Randall Breaux, Laboratories and Scientific Services, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW, Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: November 29, 2006

IRA S. REESE,
Executive Director,
Laboratories and Scientific Services.

[Published in the Federal Register, December 5, 2006 (71 FR 70524)]

RE-ACCREDITATION AND RE-APPROVAL OF SGS NORTH AMERICA INC.,—TAMPA, FLORIDA AS A COMMERCIAL GAUGER AND LABORATORY

[CBP Dec. 06–38]

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of re-approval of SGS North America Inc., of Tampa, Florida, as a commercial gauger and laboratory.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 151.12 and 151.13, SGS North America Inc., 1212 North 39th Street, Suite 330, Tampa, Florida 33605, has been re-approved to gauge pe-

troleum and petroleum products, organic chemicals and vegetable oils, and to test petroleum and petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 151.13.

DATES: The re-approval of SGS North America Inc., as a commercial gauger and laboratory became effective on May 25, 2006. The next triennial inspection date will be scheduled for May 2009.

FOR FURTHER INFORMATION CONTACT: Eugene J. Bondoc, Ph.D, or Randall Breaux, Laboratories and Scientific Services, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW, Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: November 29, 2006

IRA S. REESE,
Executive Director,
Laboratories and Scientific Services.

[Published in the Federal Register, December 5, 2006 (71 FR 70524)]

General Notices

19 CFR PART 113

SPECIFIC INSTRUCTION; BONDS FOR MARINE TERMINAL OPERATORS

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of specific instruction.

SUMMARY: This instruction, issued under the authority granted to the Commissioner of Customs and Border Protection (CBP) under the provisions of 19 USC 1623 and 19 CFR 113.1, requires marine terminal operators to take out a Terminal Operator Bond, the terms and conditions of which are described in this instruction, to provide guarantees of payment in the event that terminal operators incur civil monetary penalties for allowing containers or cargo to be delivered from their terminals without authorization from CBP. Terminal operators that are also international carriers and are holders of international carrier bonds will not be required to take on an additional bond. In lieu of execution of the Terminal Operator Bond, marine terminal operators may take out an International Carrier Bond on a CF–301. Those operators who handle bulk merchandise exclusively are exempt from this requirement.

EFFECTIVE DATE: January 20, 2007.

FOR FURTHER INFORMATION CONTACT: Jeremy Baskin, Regulations and Rulings, Office of International Trade, CBP, at jeremy.baskin@dhs.gov.

BACKGROUND:

The provisions of section 623(a) of the Tariff Act of 1930, as amended, (title 19, United States Code, section 1623(a)), state that "in any case where a bond is not required by law, the Secretary of the Treasury may by regulation or specific instruction authorize customs officers to require such bonds . . . as . . . they may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Customs Service[1] may be authorized to enforce." The provisions of section 113.1 of the Customs and Border Protection Regulations (19 CFR 113.1) autho-

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[1] Sections 403(1) and 411 of the Homeland Security Act of 2002 ("the Act," Pub. L. 107–296) transferred the United States Customs Service and certain of its functions from the Department of the Treasury to the Department of Homeland Security; pursuant to section 1502 of the Act, the President renamed the "Customs Service" as the "Bureau of Customs and Border Protection," also referred to as "CBP."

rize the Commissioner of Customs to require by specific instruction such bonds as described in the underlying statutory authority.

In performing its ongoing responsibility of ensuring the integrity of the supply chain, CBP exercises its authority found in title 19, United States Code, including sections 1431, 1433, 1434, 1436, 1448, 1451, and 1453, over the arrival, entry, manifesting and unlading of cargo to regulate international carriers who arrive from foreign. CBP exercises its examination authority found in title 19, United States Code, section 1499, to regulate parties such as container freight stations and centralized examination stations that take custody of containers and cargo arriving from foreign places. As part of this regulatory process, CBP has required the above parties to post international carrier or custodial bonds to provide CBP with a monetary remedy guaranteed by surety when violations of law or regulation by those bonded parties are discovered.

While marine terminal operators are defined under The Shipping Act of 1984 (46 U.S.C. App. 1702(14)) as persons engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49, United States Code, for purposes of this instruction only those marine terminal operators who engage in commerce with containers and cargo arriving from foreign will be affected. These operators may be public or private entities.

Recently, CBP has detected violations of law when vessel containers and cargo arriving from foreign that are designated for CBP examination for security or other purposes are offloaded from the arriving vessels to marine terminals and then are delivered from those terminals without examination by CBP having occurred. The assessment of civil monetary penalties under the provisions of title 19, United States Code, section 1595a(b) for the introduction of articles into the United States contrary to law against every person who is in any way concerned with this activity may occur. Terminal operators and carriers have been found to be culpable in these situations. It is the view of CBP that to assure compliance with laws prohibiting the delivery of this merchandise from the terminals without CBP authorization contrary to the provisions of title 19, United States Code, section 1448, or without examination contrary to the provisions of title 19, United States Code, section 1499, that terminal operators should be required to post bonds.

CBP acknowledges that many terminals are operated by parties that are also international carriers. Those parties already hold international carrier bonds that guarantee the payment of penalties incurred. They will not be required to post a terminal operator bond in addition to any international carrier bond that they have provided.

In addition, any marine terminal operator may, in lieu of executing the attached terminal operator bond, execute an international carrier bond on the CF–301.

ACTION:

All marine terminal operators at ports of entry who engage in commerce with containers and cargo arriving from foreign, except those operators who handle bulk cargo exclusively, are required to post a Marine Terminal Operator bond if they do not have a valid international carrier bond already in force. The terms and conditions of the marine terminal operator bond are attached as an Appendix to this document. The Marine Terminal Operator bond must be filed at the port of entry where the affected terminal is located. If a marine terminal operator has facilities at more than one port, the bond may be filed at any port where the operator has a facility. Separate bonds will not be required for each facility.

The bond attached hereto may be amended by rider or terminated in accordance with CBP Regulations. Any claim arising against this bond is subject to the administrative provisions of Part 172 of the CBP Regulations.

The Marine Terminal Operator Bond limit of liability shall be fixed in an amount the port director may deem necessary to accomplish the purpose for which the bond is given, but not less than $100,000. Volume of cargo traffic at a terminal may be considered as a factor in setting the bond amount. As deemed necessary, the port director may set a bond limit of up to $250,000 for marine terminal operators who have incurred violations of allowing cargo to exit the terminal without CBP authorization. If a port director seeks to set a bond limit in excess of $250,000 based upon the past performance of a terminal operator, this limit may only be set with the concurrence of the Office of Field Operations in CBP Headquarters.

If a marine terminal operator has a current valid international carrier bond, that bond amount will not be changed; however, it may be reviewed for sufficiency at CBP's discretion. All Marine Terminal Operator Bond amounts will be monitored by the Office of Field Operations, CBP Headquarters, to ensure uniformity.

Dated: December 1, 2006

W. RALPH BASHAM,
Commissioner of Customs and Border Protection.

APPENDIX

TERMINAL OPERATOR BOND

KNOW ALL MEN BY THESE PRESENTS, that _____ of _____, as principal having CBP Identification Number _____ and _____, as surety are held and firmly bound unto the United States of America up to the sum of _____ dollars ($ _____) for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Whereas, the named principal operates a marine terminal into which containers and cargo from foreign are unladen and are delivered into the commerce of the United States.

Whereas, if the named principal incurs any penalty as provided by law or regulation that relates to the delivery of any cargo or container(s) or both from the terminal operated by the principal without the prior approval of an officer of Customs and Border Protection, the obligors (principal and surety, jointly and severally) agree to pay an amount up to the penal sum upon demand by Customs and Border Protection.

This bond is effective _____, 20 __, and remains in force for one year beginning with the effective date and for each succeeding annual period, or until terminated. This bond constitutes a separate bond for each period in the amount listed above for liabilities that accrue in each period. The intention to terminate this bond must be conveyed within the period and manner prescribed in the Customs and Border Protection Regulations.

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF:

_____
(Name) (Address)

_____
(Name) (Address)

_____
(Principal Name) (Seal)

_____

_____
(Principal Address)

_____
(Surety Name) (Seal)

Surety No. _____

_____

_____

_____

(Surety Mailing Address)

Surety Agent Name _____

Surety Agent ID Number _____

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, December 6, 2006.

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

William G. Rosoff for SANDRA L. BELL,
Executive Director,
Regulations and Rulings Office of Trade.

19 CFR PART 177

PROPOSED REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN LAMINATED VENEER LUMBER

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of two tariff classification ruling letters and revocation of treatment relating to the classification of certain laminated veneer lumber ("LVL").

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182,107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection ("CBP") intends to revoke two ruling letters relating to the tariff classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), of certain LVL. Similarly, CBP proposes to revoke any treatment previously accorded by it to substantially identical transactions. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before January 20, 2007.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799

9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark of the Trade and Commercial Regulations Branch at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Brian Barulich, Tariff Classification and Marking Branch, at (202) 572–8883.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke two ruling letters relating to the tariff classification of certain LVL. Although in this notice CBP is specifically referring to the revocation of Headquarters Ruling Letter ("HQ") 086255 and HQ 086256, both dated January 23, 1990 (Attachments A and B, respectively), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to sub-

stantially identical transactions. Any person involved with substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ 086255 and HQ 086256, CBP classified certain LVL in subheading 4418.90.40, HTSUS, which provided for: "Builders' joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes: Other: Other." While subheading 4418.90.40, HTSUS, has since been deleted, subheading 4418.90.45, HTSUS, now provides for the same merchandise. As a result of the additional information received after the issuance of HQ 086255 and HQ 086256, as well as a review of the heading text and Explanatory Notes, CBP now recognizes that the LVL which was the subject of those rulings is not classified in heading 4418, HTSUS, which provides for "Builders' joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes" because it does not have any recognizable features that dedicate and limit its use to the construction of buildings, which is a characteristic of merchandise of heading 4418, HTSUS. CBP's current view is that the LVL at issue in both rulings is classified in heading 4412, HTSUS, which provides for: "Plywood, veneered panels and similar laminated wood."

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke HQ 086255, HQ 086256, and any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper classification of the merchandise pursuant to the analyses set forth in proposed HQ 968306 (Attachment C) and proposed HQ 968307 (Attachment D). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions that are contrary to the determination set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

DATED: November 30, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 086255
January 23, 1990
CLA–CO:R:C:G 086255 MH
CATEGORY: Classification
TARIFF NO.: 4418.90.40

MR. STEVE SANDERS
BORDER BROKERAGE CO., Inc.
P.O. Box B
Blaine, Washington 98290

RE: Reconsideration of **NYRL 844464** dated August 29, 1989; "Laminated Veneer Lumber"

DEAR MR. SANDERS:

This is in reference to a ruling issued to you by the Area Director, New York Seaport, dated August 29, 1989 (our reference **NY 844464**), on the tariff classification of a product called laminated veneer lumber (LVL).

FACTS:

LVL consists of multiple laminations of veneers having their grains parallel. In the case of your merchandise, the veneers are each one-eighth inch thick. The merchandise is produced in thicknesses of 3/4 inch to 2-1/2 inches and in lengths of 8 to 60 feet. After importation, the merchandise may be cut to any length or width the customer desires.

In a ruling dated August 29, 1989 (our reference **NY 844464**), the Area Director, New York Seaport, stated that the applicable subheading for LVL is 4412.99.9020, Harmonized Tariff Schedule of the United States (HTS), which provides for other veneered panels and similar laminated wood.

ISSUE:

Whether LVL is classifiable as builders' carpentry of heading 4418 or as plywood, veneered panels and similar laminated wood of heading 4412.

LAW AND ANALYSIS:

In determining whether LVL is properly classifiable in heading 4412, our first resort is to the language of the heading. In this instance the terms plywood, veneered panels and similar laminated wood are specifically described in the Explanatory Notes to the Harmonized Commodity Description and Coding System.

LVL is not plywood because the grains of the plies are parallel rather than at an angle as is the case with plywood. LVL is not a veneered panel because such panels are described in the Explanatory Notes as consisting of a thin veneer of wood affixed to a base, usually of inferior wood. LVL by contrast consists of multiple plies of wood used for structural purposes. Finally, LVL does not meet the description of nor is it akin to the various products enumerated in the Explanatory Notes as constituting similar laminated wood. Accordingly, classification under heading 4412 is precluded.

On the basis of the information provided, it is clear that LVL is a structural lumber product that is used in a variety of load bearing applications in

the construction industry. It is a highly engineered product which is designed in many instances as a direct substitute for glue laminated timber. The Explanatory Notes to heading 4418 specifically provide that the term builders' carpentry includes glulam. In view of the similarity as to use between glulam and LVL and its use as a structural lumber product generally, we find that LVL is properly classifiable in heading 4418.

Accordingly, your merchandise is classifiable in subheading 4418.90.40 as builders' carpentry. The 9th and 10th digits of the subheading number, required to be supplied upon entry of the merchandise, will be determined by the condition of the merchandise at the time of entry. See the provision of subheading 4418.90.40, attached. Articles which meet the definition of "goods originating in the territory of Canada" (see General Note 3(c)(ii)(B), HTSUSA) are subject to reduced rates of duty under the United States-Canada Free Trade Agreement Implementation Act of 1988. If your merchandise meets these requirements and the requirements of the applicable regulations, the applicable rate of duty is 4 percent ad valorem. Otherwise, the general rate of 5.1 percent ad valorem shall apply. Pursuant to section 177.9, Customs Regulations (19 CFR Part 177), our previous ruling is hereby modified in conformity with the foregoing analysis.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

Enclosure

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 086256
January 23, 1990
CLA–CO:R:C:G 086256 MH
CATEGORY: Classification
TARIFF NO.: 4418.90.40

MR. KEITH ERICKSON
T.J. INTERNATIONAL
380 East Park Center Boulevard
Boise, Idaho 83706

RE: Tariff Classification of Laminated Veneer Lumber

DEAR MR. ERICKSON:

This is in reference to a letter dated October 23, 1989, in which you request a ruling on the classification of a product known as laminated veneer lumber (LVL).

FACTS:

LVL consists of multiple laminations of veneers having their grains parallel. In the case of your merchandise, the veneers are each one-eighth inch thick. The merchandise is produced in thicknesses of 3/4 inch to 2-1/2 inches

and in lengths of 8 to 60 feet. After importation, the merchandise may be cut to any length or width the customer desires.

In a ruling dated August 29, 1989 (our reference **NY 844464**), the Area Director, New York Seaport, stated that the applicable subheading for LVL is 4412.99.9020, Harmonized Tariff Schedule of the United States (HTS), which provides for other veneered panels and similar laminated wood.

ISSUE:

Whether LVL is classifiable as builders' carpentry of heading 4418 or as plywood, veneered panels and similar laminated wood of heading 4412.

LAW AND ANALYSIS:

You argue that the previous ruling is incorrect and that LVL is properly classifiable in heading 4418 as builders' carpentry. You believe that the use of LVL as a structural lumber product qualifies it for classification in heading 4418. Moreover, you argue that LVL does not meet the terms of heading 4412.

Upon review of the information which you have provided, we agree that LVL is not classifiable in heading 4412 because it does not meet the description of plywood, veneered panels or of similar laminated wood. Each of these terms is described specifically in the Explanatory Notes to the Harmonized Commodity Description and Coding System. LVL is not plywood because the grains of the plies are parallel rather than at an angle as is the case with plywood. LVL is not a veneered panel because such panels are described in the Explanatory Notes as consisting of a thin veneer of wood affixed to a base, usually of inferior wood. LVL by contrast consists of multiple plies of wood used for structural purposes. Finally, LVL does not meet the description of nor is it akin to the various products enumerated in the Explanatory Notes as constituting similar laminated wood. Accordingly, classification under heading 4412 is precluded.

On the basis of the information you have provided, it is clear that LVL is a structural lumber product that is used in a variety of load-bearing applications in the construction industry. It is a highly engineered product which is designed in many instances as a direct substitute for glue laminated timber. The Explanatory Notes to heading 4418 specifically provide that the term builders' carpentry includes glulam. In view of the similarity as to use between glulam and LVL and its use as a structural lumber product generally, we find that LVL is properly classifiable in heading 4418.

HOLDING:

The merchandise is classifiable in subheading 4418.90.40 as builders' carpentry, dutiable at the rate of 5.1 percent ad valorem. The 9th and 10th digits of the subheading number, required to be supplied upon entry of the merchandise, will be determined by the condition of the merchandise at the time of entry. See the provision of subheading 4418.90.40, attached.

Pursuant to section 177.9, Customs Regulations (19 CFR Part 177), we have reviewed our previous ruling and found it not to reflect the current views of the Customs Service. Our previous ruling will be modified in conformity with the foregoing analysis.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

Enclosures

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 968306
CLA–RR:CTF:TCM 968306 BtB
CATEGORY: Classification
TARIFF NO.: 4412

MR. STEVE SANDERS
BORDER BROKERAGE CO., INC.
P.O. Box B
Blaine, WA 98290

Re: Classification of laminated veneer lumber; HQ 086255 revoked

DEAR MR. SANDERS:

U.S. Customs and Border Protection ("CBP") has determined that Headquarters Ruling Letter ("HQ") 086255, issued to you on January 23, 1990, is in error. In that ruling, CBP classified certain laminated veneer lumber ("LVL") in subheading 4418.90.40, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), which provides for: "Builders' joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes: Other: Other." This ruling revokes HQ 086255 and sets forth the correct classification of the LVL.

FACTS:

In HQ 086255, the merchandise at issue was described as follows:

> LVL consists of multiple laminations of veneers having their grains parallel. In the case of your merchandise, the veneers are each one-eighth inch thick. The merchandise is produced in thicknesses of 3/4 inch to 2-1/2 inches and in lengths of 8 to 60 feet. After importation, the merchandise may be cut to any length or width the customer desires.

The ruling does not state the species of wood used to make the LVL.

ISSUE:

What is the classification of the LVL?

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation ("GRI"). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." If the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied, in order.

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN") constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary

on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

Heading 4412, HTSUSA, provides for: "Plywood, veneered panels and similar laminated wood." The EN to heading 4412, in pertinent part, states that the heading covers:

> (1) **Plywood** consisting of three or more sheets of wood glued and pressed one on the other and generally disposed so that the grains of successive layers are at an angle; this gives the panels greater strength and, by compensating shrinkage, reduces warping. Each component sheet is known as a " ply " and plywood is usually formed of an odd number of plies, the middle ply being called the " core ".
>
> (2) **Veneered panels**, which are panels consisting of a thin veneer of wood affixed to a base, usually of inferior wood, by glueing under pressure.
>
> Wood veneered on to a base other than wood (e.g., panels of plastics) is also classified here provided it is the veneer which gives the panel its essential character.
>
> (3) **Similar laminated wood**. This group can be divided into two categories :
>
> –Blockboard, laminboard and battenboard, in which the core is thick and composed of blocks, laths or battens of wood glued together and surfaced with the outer plies. Panels of this kind are very rigid and strong and can be used without framing or backing.
>
> –Panels in which the wooden core is replaced by other materials such as a layer or layers of particle board, fibreboard, wood waste glued together, asbestos or cork.
>
> However, the heading **does not cover** massive products such as laminated beams and arches (so-called " glulam " products) (generally **heading 44.18**).
>
> The products of this heading remain classified herein whether or not they have been worked to form the shapes provided for in respect of the goods of heading 44.09, curved, corrugated, perforated, cut or formed to shapes other than square or rectangular and whether or not they have been worked at the surface, the edge or the end, or coated or covered (e.g., with textile fabric, plastics, paint, paper or metal) or submitted to any other operation, **provided** these operations do not thereby give such products the essential character of articles of other headings.

In HQ 086255, we held that the LVL at issue was not classifiable in heading 4412, HTSUSA, as it did not meet the description of plywood, veneered panels or similar laminated wood. We stated that the LVL was not plywood because the plies were parallel rather than at an angle, and that it was not veneered panels as described in the EN because such panels consist of a thin veneer of wood affixed to a base, usually of inferior wood. The pertinent portion of HQ 086255 reads as follows:

> [I]t is clear that LVL is a structural lumber product that is used in a variety of load bearing applications in the construction industry. It is a highly engineered product which is designed in many instances as a di-

rect substitute for glue laminated timber. The Explanatory Notes to heading 4418 specifically provide that the term builders' carpentry includes glulam. In view of the similarity as to use between glulam and LVL and its use as a structural lumber product generally, we find that LVL is properly classifiable in heading 4418.

We no longer find the view stated in HQ 086255 to be correct. We still agree that LVL is not constructed like plywood. However, like veneer panels, the critical feature of LVL is that it is composed of laminated veneers. While we stated in HQ 086255 that glulam and LVL were similar, we now find this view to be incorrect. Glulam is made from lumber that is face and edge glued together to form massive products. In HQ 088292, dated February 21, 1991, we held that glulam is a particular type of structural timber product obtained by gluing together a number of wood laminations in a certain way to provide structural strength. Special construction, dimension and load bearing capacity are all features of glulam.

LVL does not have any recognizable features that dedicate and limit its use to the construction of buildings, which is characteristic of merchandise of heading 4418. *See generally* EN to heading 4418. Although LVL may be used for that purpose, it is a multiple use wood material similar to plywood panels, lumber boards and other wood boards. LVL may be used in many nonstructural applications such as scaffolding, planks, concrete forming, core material for windows and door manufacturing, furniture manufacturing, truck flooring, ladder rails, etc. Like lumber, it may be cut to many sizes and further manufactured for a variety of uses. *See generally* HQ 960469, dated October 24, 1997. For these reasons, it was incorrect to classify the LVL in heading 4418, HTSUSA.

Based on the foregoing, we find that LVL is a multi-use product with a construction similar to a veneer panel. Accordingly, it is classified in heading 4412, HTSUSA, pursuant to GRI 1.

HOLDING:

The laminated veneer lumber at issue is classified in heading 4412, HTSUSA, which provides for: "Plywood, veneered panels and similar laminated wood." Because we do not know the species of wood used to make the LVL, we cannot provide the classification of the lumber at the subheading level.

EFFECT ON OTHER RULINGS:

HQ 086255, dated January 23, 1990, is hereby revoked.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 968307
CLA–2 RR:CTF:TCM 968307 BtB
CATEGORY: Classification
TARIFF NO.: 4412

MR. KEITH ERICKSON
T.J. INTERNATIONAL
380 East Park Center Boulevard
Boise, ID 83706

Re: Classification of laminated veneer lumber; HQ 086256 revoked

DEAR MR. ERICKSON:

U.S. Customs and Border Protection ("CBP") has determined that Headquarters Ruling Letter ("HQ") 086256, issued to you on January 23, 1990, is in error. In that ruling, CBP classified certain laminated veneer lumber ("LVL") in subheading 4418.90.40, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), which provides for: "Builders' joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes: Other: Other." This ruling revokes HQ 086256 and sets forth the correct classification of the LVL.

FACTS:

In HQ 086256, the merchandise at issue was described as follows:

> LVL consists of multiple laminations of veneers having their grains parallel. In the case of your merchandise, the veneers are each one-eighth inch thick. The merchandise is produced in thicknesses of 3/4 inch to 2-1/2 inches and in lengths of 8 to 60 feet. After importation, the merchandise may be cut to any length or width the customer desires.

The ruling does not state the species of wood used to make the LVL.

ISSUE:

What is the classification of the LVL?

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation ("GRI"). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." If the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied, in order.

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN") constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary

on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

Heading 4412, HTSUSA, provides for: "Plywood, veneered panels and similar laminated wood." The EN to heading 4412, in pertinent part, states that the heading covers:

> (1) **Plywood** consisting of three or more sheets of wood glued and pressed one on the other and generally disposed so that the grains of successive layers are at an angle; this gives the panels greater strength and, by compensating shrinkage, reduces warping. Each component sheet is known as a " ply " and plywood is usually formed of an odd number of plies, the middle ply being called the " core ".
>
> (2) **Veneered panels**, which are panels consisting of a thin veneer of wood affixed to a base, usually of inferior wood, by glueing under pressure.
>
> Wood veneered on to a base other than wood (e.g., panels of plastics) is also classified here provided it is the veneer which gives the panel its essential character.
>
> (3) **Similar laminated wood**. This group can be divided into two categories :
>
> –Blockboard, laminboard and battenboard, in which the core is thick and composed of blocks, laths or battens of wood glued together and surfaced with the outer plies. Panels of this kind are very rigid and strong and can be used without framing or backing.
>
> –Panels in which the wooden core is replaced by other materials such as a layer or layers of particle board, fibreboard, wood waste glued together, asbestos or cork.
>
> However, the heading **does not cover** massive products such as laminated beams and arches (so-called " glulam " products) (generally **heading 44.18**).
>
> The products of this heading remain classified herein whether or not they have been worked to form the shapes provided for in respect of the goods of heading 44.09, curved, corrugated, perforated, cut or formed to shapes other than square or rectangular and whether or not they have been worked at the surface, the edge or the end, or coated or covered (e.g., with textile fabric, plastics, paint, paper or metal) or submitted to any other operation, **provided** these operations do not thereby give such products the essential character of articles of other headings.

In HQ 086256, we held that the LVL at issue was not classifiable in heading 4412, HTSUSA, as it did not meet the description of plywood, veneered panels or similar laminated wood. We stated that the LVL was not plywood because the plies were parallel rather than at an angle, and that it was not veneered panels as described in the EN because such panels consist of a thin veneer of wood affixed to a base, usually of inferior wood. The pertinent portion of HQ 086256 reads as follows:

> [I]t is clear that LVL is a structural lumber product that is used in a variety of load bearing applications in the construction industry. It is a highly engineered product which is designed in many instances as a di-

rect substitute for glue laminated timber. The Explanatory Notes to heading 4418 specifically provide that the term builders' carpentry includes glulam. In view of the similarity as to use between glulam and LVL and its use as a structural lumber product generally, we find that LVL is properly classifiable in heading 4418.

We no longer find the view stated in HQ 086256 to be correct. We still agree that LVL is not constructed like plywood. However, like veneer panels, the critical feature of LVL is that it is composed of laminated veneers. While we stated in HQ 086256 that glulam and LVL were similar, we now find this view to be incorrect. Glulam is made from lumber that is face and edge glued together to form massive products. In HQ 088292, dated February 21, 1991, we held that glulam is a particular type of structural timber product obtained by gluing together a number of wood laminations in a certain way to provide structural strength. Special construction, dimension and load bearing capacity are all features of glulam.

LVL does not have any recognizable features that dedicate and limit its use to the construction of buildings, which is characteristic of merchandise of heading 4418. *See generally* EN to heading 4418. Although LVL may be used for that purpose, it is a multiple use wood material similar to plywood panels, lumber boards and other wood boards. LVL may be used in many nonstructural applications such as scaffolding, planks, concrete forming, core material for windows and door manufacturing, furniture manufacturing, truck flooring, ladder rails, etc. Like lumber, it may be cut to many sizes and further manufactured for a variety of uses. *See generally* HQ 960469, dated October 24, 1997. For these reasons, it was incorrect to classify the LVL in heading 4418, HTSUSA.

Based on the foregoing, we find that LVL is a multi-use product with a construction similar to a veneer panel. Accordingly, it is classified in heading 4412, HTSUSA, pursuant to GRI 1.

HOLDING:

The laminated veneer lumber at issue is classified in heading 4412, HTSUSA, which provides for: "Plywood, veneered panels and similar laminated wood." Because we do not know the species of wood used to make the LVL, we cannot provide the classification of the lumber at the subheading level.

EFFECT ON OTHER RULINGS:

HQ 086256, dated January 23, 1990, is hereby revoked.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Slip Op. 06–174

ACTION GLOVE COMPANY, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: MUSGRAVE, Judge
Court No. 04–00002
(with attached schedule)

JUDGMENT

The above-captioned actions were stayed pending this Court's resolution of *Cricket Hosiery, Inc. v. United States*, Court Number 03–00533. On April 24 of this year, the Court issued a final judgment dismissing that action. *See Cricket Hosiery, Inc. v. United States*, 30 CIT ___ , 429 F. Supp. 2d 1338 (2006). On September 28, the Court ordered that each of the above-captioned plaintiffs "shall, within 30 days of the date of this Order, show cause why its action should not be dismissed for lack of prosecution." To date, no plaintiff has come forward with any reason why these actions should not be dismissed. Therefore, pursuant to United States Court of International Trade Rule 41(b)(3), it is hereby

ORDERED that these actions are dismissed for lack of prosecution.

SCHEDULE

Court Number	Plaintiff
03–00707	Fila U.S.A. Inc.
03–00739	Eastern Pacific Apparel, Inc.
03–00740	Vans, Inc.
03–00768	Firoze Fakhri
03–00769	Farbe, Inc.
03–00779	Capital Mercury Apparel, Ltd.
03–00802	G-Star Apparel, Inc.

Court Number	Plaintiff
03–00815	Franco Apparel Group, Inc.
03–00857	Esportia International, Inc.[1]
03–00873	Seattle Pacific Industries, Inc.
03–00877	Sears, Roebuck & Company
03–00892	Louisville Bedding Company
03–00929	Johnson & Johnson Consumer Products Companies, Inc.
03–00930	Impact Imports International, Inc.
04–00141	Sumitomo Corporation of America

Slip Op. 06–175

CONSOLIDATED FIBERS, INC., STEIN FIBERS, LTD., BERNET INTERNATIONAL TRADING, LLC, AND BMT COMMODITY CORPORATION, Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 06–00134

OPINION AND ORDER

[Motions to dismiss denied.]

Dated: November 30, 2006

deKieffer & Horgan (*Gregory S. Menegaz, Merritt R. Blakeslee, J. Kevin Horgan*) for the Plaintiffs Consolidated Fibers, Inc., Stein Fibers, Ltd., Bernet International Trading, LLC, and BMT Commodity Corporation.

James M. Lyons, General Counsel, *Neal J. Reynolds*, Assistant General Counsel for Litigation, *Karl von Schriltz*, Attorney-Advisor, United States International Trade Commission, for the Defendant.

Kelly Drye Collier Shannon (*Paul C. Rosenthal, Kathleen W. Cannon, David C. Smith, Jr.*) for the Defendant-Intervenors Dak Fibers, LLC, Invista S.a.r.l., and Wellman, Inc.

Gordon, Judge: Defendant and Defendant-Intervenors move to dismiss count two of Plaintiffs' complaint for lack of subject matter jurisdiction pursuant to USCIT R. 12(b)(1), and for failure to state a claim upon which relief can be granted pursuant to USCIT R. 12(b)(5). For the reasons set forth below, the motions are denied.

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[1] Also identified as Exportia International Incorporated.

I. Background

During the five-year ("sunset") reviews of the antidumping duty orders on polyester staple fiber ("PSF") from Korea and Taiwan, Plaintiffs requested that the United States International Trade Commission ("Commission") institute a proceeding to reconsider the original PSF injury determinations because of new evidence that certain domestic producers conspired to fix PSF prices and allocate customers during the original period of investigation and part of the review period. Letter dated Oct. 26, 2005 from deKieffer & Horgan to Secretary Abbott at 2–3, 18–22, ("Reconsideration Request"), *Certain Polyester Staple Fiber from Korea and Taiwan*, Inv. Nos. 731–TA–825–826. Plaintiffs argued that this conspiracy had compromised the integrity of the Commission's original investigations and that the Commission should therefore institute a reconsideration proceeding and revoke the antidumping duty orders *ab initio*. *Id.*

Plaintiffs believed there were "striking and highly relevant parallels" between the alleged PSF antitrust conspiracy and the Commission's reconsideration proceeding in *Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela*, Inv. Nos. 303–TA–23, 731–TA–566–570 and 731–TA–641 (reconsideration), USITC Pub. 3218 (Aug. 1999) ("*Ferrosilicon*"). Reconsideration Request at 3. In *Ferrosilicon*, the Commission reconsidered original injury determinations underlying a countervailing duty order covering ferrosilicon from Venezuela, and antidumping duty orders covering ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela. *Ferrosilicon* began with a petition pursuant to Section 751(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(b) (2000).[1] The Brazilian ferrosilicon importers requested a changed circumstances review of the Commission's material injury determination on Brazilian ferrosilicon because of new evidence of a price-fixing conspiracy among domestic producers. The Commission instituted the requested changed circumstances review and self-initiated changed circumstances reviews of the related material injury determinations for ferrosilicon from China, Kazakhstan, Russia, Ukraine, and Venezuela. *Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela*, 63 Fed. Reg. 40,314 (Int'l Trade Comm'n July 28, 1998) (notice of changed circumstances reviews).

The Commission subsequently suspended these changed circumstances reviews, determining that "reconsideration" was a more appropriate procedure for review of the original determinations than a changed circumstances review. *Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela*, 64 Fed. Reg. 28,212 (Int'l Trade Comm'n May 25, 1999) (notice of suspension of changed

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[1] All further citations to the Tariff Act of 1930 are to the relevant provision in Title 19 of the U.S. Code, 2000 edition.

circumstances review and commencement of reconsideration proceeding). Thereafter, the Commission reversed its original affirmative material injury determinations *ab initio* and issued a negative injury determination for each of the original investigations. *Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela*, 64 Fed. Reg. 47,865, 47,865–66 (Int'l Trade Comm'n Sept. 1, 1999); USITC Pub. 3218 at 1. The Commission concluded on reconsideration that the domestic industry had never been materially injured, or threatened with material injury by reason of the ferrosilicon imports. USITC Pub. 3218 at 4.

In accordance with the Commission's action, Commerce "rescinded" the antidumping and countervailing duty orders covering the subject imports, explaining that the Commission's negative injury determinations on reconsideration had "rendered [the orders] legally invalid from the date of issuance." *Ferrosilicon From Brazil, Kazakhstan, People's Republic of China, Russia, Ukraine, and Venezuela*, 64 Fed. Reg. 51,097, 51,098 (Dep't of Commerce Sept. 21, 1999) (notice of rescission of antidumping duty orders).

Despite some apparent parallels of the antitrust activity among the domestic producers of ferrosilicon and the antitrust activity among the domestic producers of PSF, the Commission preliminarily denied Plaintiffs' reconsideration request. Plaintiffs, however, continued to argue in the on-going sunset reviews that the alleged price-fixing and customer allocation conspiracy had compromised the integrity of the Commission's original PSF investigation and injury determinations. *Certain Polyester Staple Fiber from Korea and Taiwan*, Inv. Nos. 731–TA–825–826 (Review), USITC Pub. 3843 at 16–22 (Mar. 2006). In response, petitioners—Defendant-Intervenors here—argued that Plaintiffs' price-fixing allegations related only to a PSF product known as "fine denier" PSF, which is not subject to the antidumping orders on PSF from Korea and Taiwan. *Id.* at 17–18.

The Commission conducted a public hearing on January 17, 2006, in which interested parties provided testimony and answered Commission questions on the alleged antitrust conspiracy. On March 20, 2006, the Commission issued its final decision on Plaintiffs' reconsideration request (together with its final views in the sunset review of PSF from Korea and Taiwan), explaining that a reconsideration proceeding was not warranted. *Id.* at 16–23.

Count two of Plaintiffs' complaint challenges the Commission's decision not to revoke the original injury determinations *ab initio*, and by extension, the denial of Plaintiffs' reconsideration request. Defendant and Defendant-Intervenors move to dismiss count two of Plaintiffs' complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

II. Standard of Review

In deciding a USCIT R. 12(b)(1) motion that does not challenge the factual basis for the complainant's allegations, and when deciding a USCIT R. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations to be true and draws all reasonable inferences in plaintiff's favor. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n.13 (Fed. Cir. 1993); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (subject matter jurisdiction); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (failure to state a claim).

III. Discussion

A. Subject Matter Jurisdiction

Plaintiffs assert jurisdiction for count two of their complaint under 28 U.S.C. § 1581(c) (2000) or 28 U.S.C. § 1581(i) (2000).

1. 28 U.S.C. § 1581(c)

Section 1581(c) provides the Court of International Trade with jurisdiction to review certain Commission antidumping determinations listed in 19 U.S.C. § 1516a(a). Plaintiffs contend that the Commission's denial of their reconsideration request "is subsumed within, and inseparable from" the Commission's final PSF sunset determination, which is one such reviewable determination pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii). (Pls.' Opp'n to Mot. to Dismiss at 6.) Although the Commission must take into account "its prior injury determinations" when conducting a sunset review, 19 U.S.C. § 1675a(a)(1)(A), that undertaking is not equivalent to a full-blown reconsideration of the underlying injury determination.

While it made sense for the Commission to consolidate Plaintiffs' reconsideration request with the ongoing sunset review for administrative efficiency, Plaintiffs are not correct that the final sunset determination and the final denial of Plaintiffs' reconsideration request are one in the same for purposes of judicial review. They are not. Different standards of review apply to each. The Commission's final sunset determination is reviewed under the substantial evidence standard. 19 U.S.C. § 1516a(b)(1)(B)(i). The Commission's denial of Plaintiffs' reconsideration request, if reviewable at all, is reviewed under the more deferential abuse of discretion standard. 28 U.S.C. § 2640(e) (2000); 5 U.S.C. § 706(2)(A) (2000); *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278 (1987) ("the basis for challenge must be that the refusal to reopen was 'arbitrary, capricious, [or] an abuse of discretion.' 5 U.S.C. § 706(2)(A)."). Accordingly, the court's jurisdictional basis for review of the Commission's final sunset determination pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C.

§ 1516a(a)(2)(B)(iii) does not extend to review of the Commission's denial of Plaintiffs' reconsideration request.

Plaintiffs alternatively contend that the Commission's denial of their reconsideration request falls within the scope of section 1516a(a)(2)(B)(i), which identifies other reviewable Commission determinations, specifically "[f]inal affirmative determinations by . . . the Commission under section . . . 1673d of this title, including any negative part of such a determination. . . ." The Commission's denial of Plaintiffs' reconsideration request, however, is not a final affirmative determination under section 1673d, and therefore section 1516a(a)(2)(B)(i) does not cover Plaintiffs' claim.

Had the Commission commenced a reconsideration proceeding, then the resulting reconsideration determination would have been reviewable under 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(i) or § 1516a(a)(2)(B)(ii). *See Bhd. of Locomotive Eng'rs*, 482 U.S. at 278 ("When the Commission reopens a proceeding for any reason and, after reconsideration, issues a new and final order setting forth the rights and obligations of the parties, that order—even if it merely reaffirms the rights and obligations set forth in the original order—is reviewable on its merits"); *see, e.g., Elkem Metals Co. v. United States*, 26 CIT 234, 238, 193 F. Supp. 2d 1314, 1319 (2002) (asserting jurisdiction over reconsideration results pursuant to 19 U.S.C. § 1516a(a)(2)(B)(ii)). Admittedly, the Commission explained its reasons for denying the reconsideration request in sufficient detail that one might conclude that the Commission "did indeed give the case a second look (and thereby 'reconsidered' in a dictionary sense)." *Betty B. Coal Co. v. United States Dep't of Labor*, 194 F.3d 491, 496 (4th Cir. 1999). But in *Brotherhood of Locomotive Engineers*, the Supreme Court drew a bright line for courts to distinguish appealable reaffirmations from unappealable denials: the agency's "formal action" controls.

> It is irrelevant that the [agency's] order refusing reconsideration discussed the merits of the [movants'] claims at length. Where the [agency's] formal disposition is to deny reconsideration, and where it makes no alteration in the underlying order, we will not undertake an inquiry into whether reconsideration "in fact" occurred. In a sense, of course, it always occurs, since one cannot intelligently rule upon a petition to reconsider without reflecting upon, among other things, whether clear error was shown. It would hardly be sensible to say that the [agency] can genuinely deny reconsideration only when it gives the matter no thought; nor to say that the character of its action (as grant or denial) depends upon whether it chooses to disclose its reasoning. Rather, it is the [agency's] formal action, rather than its discussion, that is dispositive.

Bhd. of Locomotive Eng'rs, 482 U.S. at 280–281.

Here, the Commission did not reconsider the original injury determinations, but instead denied Plaintiffs' reconsideration request. Thus, the Court of International Trade does not have jurisdiction under 28 U.S.C. § 1581(c) (2000) to hear count two of Plaintiffs' complaint.

2. 28 U.S.C. § 1581(i)

Plaintiffs have also asserted jurisdiction under the Court of International Trade's residual jurisdictional provision, 28 U.S.C. § 1581(i), which provides a general grant of jurisdiction over civil actions commenced against the Commission arising out of the "administration and enforcement" of the antidumping laws. *See* 28 U.S.C. § 1581(i)(2) & (4) (2000). Section 1581(i) may attach, though, only if a remedy under another section of 1581 is unavailable, *see Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), a requisite satisfied in this case because section 1581(c), the only other potential jurisdictional provision, is unavailable.

Among other things, section 1581(i) supplies jurisdiction for Administrative Procedure Act ("APA") claims challenging the administration and enforcement of the antidumping laws by either the Commission or the United States Department of Commerce. *See, e.g., Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1309 (Fed. Cir. 2004) ("The case at bar is an action under the APA challenging Commerce instructions as in violation of section 1675(a)(2)(C)."). Although Plaintiffs' complaint does not expressly state that they are challenging the Commission's denial of Plaintiffs' reconsideration request under the APA, Defendant and Defendant-Intervenors have construed count two of Plaintiffs complaint to be such an action, which Plaintiffs have not disputed. Defendant and Defendant-Intervenors further contend that the Commission's denial of Plaintiffs' reconsideration request is not reviewable because there are no statutory or regulatory provisions governing a reconsideration proceeding and it is therefore an "agency action . . . committed to agency discretion by law," 5 U.S.C. § 701(a)(2) (2000), a jurisdictional limitation for APA claims that applies to the general grant of jurisdiction contained in 28 U.S.C. § 1581(i) (2000). *Cf. Bhd. of Locomotive Eng'rs*, 482 U.S. at 282 (noting that the limitation of 5 U.S.C. § 701(a)(2) applies to "the general grant of jurisdiction contained in 28 U.S.C. § 1331" and "the Hobbs Act as well").

The general rule is that an agency's denial of a petition for reconsideration is committed to agency discretion and not subject to judicial review *unless* the request is based on "new evidence or changed circumstances," in which case the court evaluates whether "the refusal to reopen was 'arbitrary, capricious, [or] an abuse of discretion.'" *Id.* at 278–79 (quoting 5 U.S.C. § 706(2)(A)); *see also, AT&T Corp. v. FCC*, 363 F.3d 504, 507–08 (D.C. Cir. 2004); *Southwestern Bell Tel. Co. v. FCC*, 180 F.3d 307, 311 (D.C. Cir. 1999) ("a petition

seeking review of an agency's decision not to reopen a proceeding is not reviewable unless the petition is based upon new evidence or changed circumstances."). Put another way, "[i]f the petition that was denied sought reopening on the basis of new evidence or changed circumstances, review is available and abuse of discretion is the standard; otherwise, the agency's refusal to go back over ploughed ground is nonreviewable." *Bhd. of Locomotive Eng'rs*, 482 U.S. at 284.

The Court in *Brotherhood of Locomotive Engineers* was interpreting the Interstate Commerce Act, which contained three grounds for rehearing: "material error, new evidence, or substantially changed circumstances." 482 U.S. at 277 (citing 49 U.S.C. § 10327(g), current version at 49 U.S.C. § 722(c) (2000)). Under the antidumping laws, the Commission has express statutory authorization to review its prior injury determinations upon the request of a party for a "changed circumstances" review. 19 U.S.C. § 1675(b). An interested party, in turn, has an express statutory right of judicial review (as opposed to an APA claim) if the Commission refuses to initiate a changed circumstances proceeding. 19 U.S.C. § 1516a(a)(1)(B). The court evaluates whether the refusal to initiate was "arbitrary, capricious, [or] an abuse of discretion," 19 U.S.C. § 1516a(b)(1)(A), the same standard applied when reviewing a denial of a reconsideration request under the APA for "new evidence or changed circumstances." Plaintiffs here did not request a changed circumstances review because they were heeding the Commission's approach in *Ferrosilicon*. Plaintiffs therefore requested that the Commission commence a reconsideration proceeding to evaluate the new evidence relating to the antitrust activity of some members of the domestic industry, just as the Commission had done in *Ferrosilicon*.

Unlike the statutory provisions for a changed circumstances review, there is no express statutory authorization for the Commission to conduct a reconsideration proceeding. The Commission, however, has inherent administrative authority under the antidumping and countervailing duty laws to reconsider its original injury determinations, at least when fraud has been perpetrated on the agency during the underlying investigations. *See Elkem Metals Co.*, 26 CIT at 240, 193 F. Supp. 2d at 1321 (reviewing *Ferrosilicon*); *see also Alberta Gas Chems., Ltd. v. Celanese Corp.*, 650 F.2d 9, 12–14 (2d Cir. 1981) ("It is hard to imagine a clearer case for [the Commission] exercising this inherent power than when a fraud has been perpetrated on the tribunal in its initial proceeding."). Under *Brotherhood of Locomotive Engineers*, the Commission's denial of a reconsideration request is unreviewable unless the request is based on new evidence, in which case the court has jurisdiction pursuant to 28 U.S.C. § 1581(i) (2000) to review the denial under the abuse of discretion standard set forth in 5 U.S.C. § 706(2)(A) (2000).

B. Failure to State a Claim upon which Relief can be Granted

Defendant and Defendant-Intervenors have also moved to dismiss count two of Plaintiffs' complaint for failure to state a claim upon which relief can be granted. In their complaint Plaintiffs challenged the Commission's failure to revoke the PSF antidumping duty orders *ab initio*. Compl. ¶¶ 7 & 25. Defendant and Defendant-Intervenors correctly note that the antidumping statute authorizes only the Department of Commerce to revoke antidumping orders, *not* the Commission. Def.-Intervenors' Reply Br. at 3 (citing 19 U.S.C. § 1675(d)), Def.'s Reply Br. at 13. Therefore, to the extent count two of Plaintiffs' complaint seeks *ab initio* revocation of the antidumping duty orders by the Commission, Plaintiffs seek relief that cannot be granted.

The Commission, however, may revoke its original injury determinations. *See Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela*, 64 Fed. Reg. 47,865, 47,865–66 (Int'l Trade Comm'n Sept. 1, 1999); USITC Pub. 3218 at 1; *Elkem Metals Co.*, 26 CIT at 240, 193 F. Supp. 2d at 1321 (reviewing *Ferrosilicon*). If it does, then Commerce revokes the antidumping duty order. *See Ferrosilicon From Brazil, Kazakhstan, People's Republic of China, Russia, Ukraine, and Venezuela*, 64 Fed. Reg. 51,097, 51,098 (Dep't of Commerce Sept. 21, 1999) (notice of rescission of antidumping duty orders) (Commission's revocation of original injury determinations "rendered [the orders] legally invalid from the date of issuance.").

At a conference held on November 29, 2006, Plaintiffs' moved to amend their complaint to replace the words "antidumping duty orders" in ¶ 7 and the word "orders" in ¶ 25 with the words "injury determinations" respectively. The court subsequently granted the motion, curing the defect in their complaint. At the conference the court inquired whether this amendment mooted Defendant and Defendant-Intervenors' motions to dismiss for failure to state a claim upon which relief can be granted.

Defendant and Defendant-Intervenors argued that it did not, and that there was still no claim upon which relief can be granted because there is no statutory or regulatory guidance for the court to review the agency's denial of Plaintiffs' reconsideration request. These arguments though, do not address Plaintiffs' purported failure to state a claim, but rather go to the question of subject matter jurisdiction over Plaintiffs' APA claim, which is addressed above. The court may not dismiss Plaintiffs' claim "unless it appears beyond doubt that [they] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). Here, Plaintiffs are seeking the relief the Commission granted in *Ferrosilicon*. The first step for Plaintiffs is to overcome the denial of their reconsideration request. Toward that end, Plaintiffs have sufficiently plead an APA claim for which some relief is possible, namely, a finding that the Commission abused its discre-

tion in denying the reconsideration request. Therefore, count two of Plaintiffs' complaint must survive Defendant and Defendant-Intervenors' Rule 12(b)(5) motions to dismiss.

IV. Conclusion

The court has jurisdiction under 28 U.S.C. § 1581(i) (2000) to hear Plaintiffs' APA claim that the Commission abused its discretion in denying Plaintiffs' reconsideration request, which was based on the newly discovered antitrust activity of members of the domestic PSF industry during the original period of investigation. To overturn that denial, Plaintiffs must show " 'the clearest abuse of discretion,' " *Bhd. of Locomotive Eng'rs*, 482 U.S. at 278 (quoting *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534–535 (1946)). Accordingly, the court denies Defendant and Defendant-Intervenors' motions to dismiss.

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1.25
1.4
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